Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Accelerating Wireline Broadband Deployment	)	
By Removing Barriers to Infrastructure	)	WC Docket No. 17-84
Investment	)	
	)	
Accelerating Wireless Broadband Deployment	)	WT Docket No. 17-79
By Removing Barriers to Infrastructure	)	
Investment	)	

REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

Kenneth S. Fellman
KISSINGER & FELLMAN, P.C.
3773 Cherry Creek N. Drive
Ptarmigan Place, Suite 900
Denver, CO 80209

Joseph Van Eaton
Gerard Lavery Lederer
Gail A. Karish
John Gasparini
BEST BEST & KRIEGER, LLP
2000 Pennsylvania Ave N.W., Suite 5300
Washington, D.C. 20006

Michael Watza
KITCH DRUTCHAS WAGNER
VALITUTTI & SHERBROOK
1 Woodward Ave, 10th Floor
Detroit, MI 48226-3499

November 19, 2018

I. INTRODUCTION

The Smart Communities and Special Districts Coalition ("Smart Communities") submits this Reply to Oppositions to its Petition for Reconsideration, filed September 4, 2018, (hereinafter, "Petition").[1] The Oppositions[2] failed to respond substantively to the arguments raised by Smart Communities' Petition for Reconsideration. Specifically, Oppositions filed by CTIA and Verizon (collectively, "Oppositions") merely reiterate the same conclusions already adopted by the Commission and often cite solely to the Ruling being challenged here as sole support for those assertions. In key areas, furthermore, they misstate Smart Communities' arguments and miss the point at issue, rendering their arguments at best inapposite, if not wholly irrelevant. In the absence of substantive opposition, the points raised in the Petition remain essentially undisputed. Smart Communities asks the Commission to grant our Petition.

II. VERIZON'S OPPOSITION VIOLATES THE COMMISSION'S RULES

The Commission's rules regarding Petitions for Reconsideration specify that "[o]ppositions shall not exceed 25 double-spaced typewritten pages."[3] Verizon's submission

[1] *See* Petition for Reconsideration of the Smart Communities and Special Districts Coalition, *In the Matter of Accelerating Wireline and Wireless Broadband Deployment by Removing Barriers to Infrastructure*, WT Docket No. 17-79, WC Docket No. 17-84 (Sep. 4, 2018) ("Petition"); *see also In the Matter of Accelerating Wireline and Wireless Broadband Deployment by Removing Barriers to Infrastructure*, WC Docket No. 17-84, WT Docket No. 17-79, Third Report and Order and Declaratory Ruling (rel. August 3, 2018) ("Declaratory Ruling" or "Ruling"). For a full listing of Smart Communities members, *see* Petition at fn. 1.

[2] *See* Opposition of Verizon, WT Docket No. 17-79, WC Docket No. 17-84 (Nov. 9, 2018) ("Verizon Opposition"); Opposition of CTIA, WT Docket No. 17-79, WC Docket No. 17-84 (Nov. 9, 2018) ("CTIA Opposition"); Opposition of NTCA, WT Docket No. 17-79, WC Docket No. 17-84 (Nov. 9, 2018); Opposition of NCTA – The Internet and Television Association, WT Docket No. 17-79, WC Docket No. 17-84 (Nov. 9, 2018) ("NCTA Opposition").

[3] 47 C.F.R. 1.429(f).

measures 29 double-spaced typewritten pages, even after excluding those pages which the Commission does not count toward page limits.[4]

III. THE COMMISSION IS NOT ENTITLED TO DEFERENCE WHEN INTERPRETING AN UNAMBIGUOUS STATUTE

The Oppositions insist that the Commission has properly interpreted Sections 253(a) and 332(c)(7), and that it is entitled to deference in its interpretation of an ambiguous statute.[5] However, the Supreme Court in *National Cable & Telecommunications Ass'n v. Brand X Internet Services* held unequivocally that an agency *cannot* override a "plain language" ruling by a Court of Appeals, and in this case, while there are undoubtedly portions of Section 253 that may be ambiguous, the critical phrase on which the order rests, "prohibit or effectively prohibit" is not.[6]

The Eighth Circuit held that "[u]nder a plain reading of the statute, we find that a plaintiff suing a municipality under Section 253(a) must show actual or effective prohibition . . . ."[7] And the Ninth Circuit, acting en banc, agreed, reversing a prior interpretation of section 253(a) equating "effective prohibition" with "possible prohibition" and replaced it with the "actual prohibition" standard.[8] Contrary to the Commission's view and to the arguments of CTIA and Verizon, therefore, the Commission is not entitled either to interpret, or to deference in interpreting, that phrase. As the Petition showed, the Commission's Order rests on the assumption that an actual prohibition is not required.

---

[4] *See generally* Verizon Opposition at pp. 26-29 (exceeding the Commission's page limits). Furthermore, Smart Communities would note that both NCTA and NTCA failed to serve Smart Communities with the Oppositions, as required by 47 C.F.R. 1.429(f).
[5] *See* CTIA Opposition at 17-18.
[6] *National Cable & Telecommunications Ass'n v. Brand X Internet Services,* 545 U.S. 967 (2005).
[7] *Level 3 Communications, L.L.C. v. City of St. Louis, Missouri,* 477 F.3d 528, 532 (8th Cir. 2007).
[8] *Sprint Telephony PCS, L.P. v. County of San Diego,* 543 F.3d 571 (9th Cir. 2008).

IV. THE OPPOSITIONS MISS THE DISTINCTION BETWEEN SECTIONS 253(A) AND 332(C)(7) DESCRIBED IN THE PETITION

Smart Communities objected to the Commissions' flawed interpretation of Sections 253(a) and 332(c)(7) because the Ruling fails to recognize any distinction between the language of the two statutory provisions. The oppositions focus solely on the point advanced by the Commission: that since the "prohibits or has the effect of prohibiting' phrase is identical, then interpretations of the two sections should similarly mirror one another. But while the terms "prohibit or effectively prohibit" may have the same (or a very similar meaning) the provisions are not identical and cannot be applied interchangeably. The express language of Section 332(c)(7) makes clear that Section 253 cannot be applied to "limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." Yet that is precisely what the Commission does in its order. The Oppositions ignore this point, which is central to Smart Communities' reconsideration and lies at the heart of the Commission's error.[9]

And as applied to wireless, furthermore, the Ruling's position remains untenable and unsupported by the Oppositions. Under previously existing Commission rules, moratoria did not pause shot clocks, rendering it impossible for them to nevertheless prohibit wireless deployment.[10] Yet now, *any* requirement which inconveniences a provider – which *might* prohibit – is impermissible under the Act. This could be read so broadly as to find a requirement that an applicant demonstrate property owner consent to be prohibitory, if a locality refused to process an application until such consent was provided. These kinds of fundamental, practical

[9] *See* Petition at 4.

[10] *See* Petition at fn. 20; *see also* Ruling at fn. 606 ("Our decision today is consistent with the Commission's earlier decisions that [. . .] these "shot clocks continue to run" regardless of whether state or local governments purport to impose moratoria that suspend the acceptance or processing of siting applications for some period of time").

problems with the Ruling were raised in the Petition, and are wholly unanswered by the Oppositions.

V. THE DEFENSE OF THE ORDER DEPENDS ON RECASTING ITS SCOPE

The Oppositions argue that Section 253(d)'s procedural requirements are irrelevant, because "the Ruling does not preempt or make any findings as to the legality of any individual laws."[11] But it is clear, as we pointed out in our Petition, that the Commission is not merely adopting a presumption with respect to moratoria – it actually emphasizes that the point of its Order is to avoid Section 253(d).[12] These Oppositions to the Petition thus effectively depend on an argument that the Commission did not do what it said it meant to do. No Opposition offers meaningful counterargument on the points raised in Part IV of the Petition.[13]

VI. THE OPPOSITIONS MISUNDERSTAND THE ROLE OF SECTIONS 253(B-C), AND IMPERMISSIBLY CONSTRAIN THE SCOPE OF THEIR PROTECTIONS

The Oppositions incorrectly support the Commission's flawed understanding of the operation of Section 253(c). In discussing planning and study, CTIA argues that "Localities can engage in planning or study, but they cannot under Section 253(a) prohibit or effectively prohibit service, and nothing in Section 253(c) changes that clear prohibition."[14] But Section 253(c)'s savings clause is absolute – local rights-of-way management practices are protected unconditionally, not only to the extent consistent with Section 253(a).[15] A local government

[11] CTIA Opposition at 7.
[12] *See* Ruling at ¶ 166, 168.
[13] *See* Petition at 21-23.
[14] CTIA Opposition at 9.
[15] *See* Petition at 10.

policy may, in fact, be prohibitory, but if it is related to management of the rights-of-way, it is saved, full stop.[16]

Leaving aside the flawed legal analysis, no Opposition addresses the frank reality that the Commission's definition of the scope of "rights of way management" is not defensible. The Ruling holds, for instance, that localities may manage the rights-of-way, but are prohibited by Federal law from having any amount of time to develop plans to consistently govern those rights-of-way, before having to address applications and time-limited demands for access. Localities are placed in the impossible position of having to manage rights-of-way in a competitively neutral and nondiscriminatory manner, while being afforded no time whatsoever to develop rules, regulations, and guidelines to facilitate that outcome. NCTA argues that the Ruling was careful to protect "state and local actions that simply entail some delay in deployment."[17] But taking time to plan and study is just that – "some delay" in order to permit compliance with other legal obligations – yet as the Commission frames its decision, that would be a moratorium. The Oppositions continually miss the mark, leaving the Petition's assertions substantively unchallenged.

Similarly flawed are the Ruling's restrictions on emergency situations. While CTIA defends the Ruling as "merely requiring [emergency moratoria] to be competitively neutral (as Section 253 requires), necessary, and tied in length and geographic scope to the disaster" they ignore the practical implications of this requirement. In California, for instance, a locality ravaged by wildfires would be compelled to devote staff resources to determining the necessity

[16] *See id.* at 9-12. No better example of the Commission's overreach on this point is its criticism of the State of Michigan's time honored, and US DOT funding requirement, that northern States include seasonal load weight restrictions during the Frost Freeze cycles which otherwise destroy roads en masse.

[17] NCTA Opposition at 8 (quoting Ruling at ¶ 150).

and scope of a moratoria, and communicate such to providers in a competitively neutral manner, and then be prepared to face potential court challenges, even amidst disaster recovery, if a provider feels it's time for that locality to start catering to their deployment needs again. To suggest that Section 253(b) was meant to give the Commission oversight over the level of effort required to respond to disasters, or to subject localities to second-guessing from one particular industry as to their priorities in recovery, suggests just how strained the Ruling's reading truly is.

VII. CONCLUSION

The Oppositions fail to offer meaningful counterargument to the errors and omissions raised by the Petition, and offer no new arguments or evidence to support the Commission's assertions. The Oppositions are unpersuasive, and the Commission should grant the relief sought in the underlying Petition for Reconsideration.

Respectfully Submitted,

/s/ Kenneth S. Fellman
Kenneth S. Fellman
Kissinger & Fellman, P.C.
3773 Cherry Creek N. Drive
Ptarmigan Place, Suite 900
Denver, CO 80209

/s/ Joseph Van Eaton
Joseph Van Eaton
Gerard Lavery Lederer
Gail A. Karish
John Gasparini
BEST BEST & KRIEGER, LLP
2000 Pennsylvania Ave N.W., Suite 5300
Washington, D.C. 20006

/s/ Michael Watza
Michael Watza
KITCH DRUTCHAS WAGNER
VALITUTTI & SHERBROOK
1 Woodward Ave, 10th Floor
Detroit, MI 48226-3499

November 19, 2018

CERTIFICATE OF SERVICE

I, John Gasparini, hereby certify that on this 19th day of November, 2018, a copy of the foregoing "Reply to Oppositions to Petition for Reconsideration" was served by first-class U.S. mail, postage prepaid, on the following:

Thomas C. Power Senior Vice President and General Counsel CTIA 1400 Sixteenth Street NW, Suite 600 Washington, D.C. 20036	Michael R. Romano Senior Vice President – Industry Affairs & Business Development NTCA – The Rural Broadband Association 4121 Wilson Boulevard, Suite 1000 Arlington, VA 22203
Steven F. Morris NCTA – The Internet & Television Association 25 Massachusetts Avenue NW, Suite 100 Washington, D.C. 20001-1431	Roy E. Litland Verizon 1300 I Street NW, Suite 500E Washington, D.C. 20005

/s/ John Gasparini
John Gasparini

November 19, 2018